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No. 99-1852

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Pennsylvania Supreme Court

SUPPLEMENTAL BRIEF - I IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July 27, 2000

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ISSUES PRESENTED

I. **Whether this Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where all the Pennsylvania state courts' decisions did not rest on "adequate and independent" state law principles.**

Answered in the Affirmative in this Document

II. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner **has** satisfied the criteria for standing under Article III of the United States Constitution.

Answered in the Affirmative in Addendum-II

III. **Whether this Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner has preserved a federal issue in the Pennsylvania state courts, and has raised federal issues in the petition.**

Answered in the Affirmative in this Document

IV. Whether the petition presents **many** issues worthy of review by this Court.

Answered in the Affirmative in Addendum-II

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The Petitioner satisfied **all** standing criteria because all the Pennsylvania state courts' decisions did not rest on "adequate and independent" state law principles; also, the Petitioner has preserved a federal issue in the Pennsylvania state courts, and has raised federal issues in the petition. Exhaustive review of federal issues raised in the Reply Brief filed by Philip Morris Incorporated ["PM"] is excluded from this brief; rather, its ambit is focused upon refuting the intended effects of the selective-quotations contained therein. [Thus, it is limited to newly-raised issues in its "I" & "III."]

Each citation was **incomplete**, and the facts of this case undermine PM's intended conclusions. Thus, this brief will cite each case as had PM, then quoted in-depth, next applied within the context of the instant case, and finally shown to support the Petition for a Writ of Certiorari of Dr. Sklaroff.

PM cited the following four cases: *ASARCO, Inc. v. Kadish,* 490 U.S. 605 (1989), *Coleman v. Thompson,* 501 U.S. 722 (1991), *Herb v. Pitcairn,* 324 U.S. 117 (1945) and *Michigan v. Long,* 463 U.S. 1032 (1983).

a. The *ASARCO* Case Supports Dr. Sklaroff.

ASARCO was quoted as having stated, "the state courts are not bound to adhere to federal standing requirements." No effort, however, had been made to invoke these criteria in any submission by Dr. Sklaroff at any time to any court. Nevertheless, a more complete analysis of this opinion yields additional insight into why Dr. Sklaroff **does** merit standing.

In *ASARCO*, the U.S. Supreme Court ruled in favor of **the petitioners** because "This Court has jurisdiction. . . ; [the lower court] had issued a final judgment; there is standing and an actual case or controversy that permits [of] a decision in federal court; and . . .the decision below is reviewable because it does not rest on an adequate and independent state ground." The focus is upon § II-C: "References to the Arizona Constitution simply reflect a holding which rests on the state court's interpretation of federal law."

From its inception, this case was framed federally. The Petitioners' Brief cited Article I of the U.S. Bill of Rights—inasmuch as the Petitioners were petitioning government—and grammatically severed this argument from subsequent citation of a "state"-related concern (in the same sentence):

> Against this background, Petitioners' position in this litigation is that the release provisions of the MSA effect an unconstitutional deprivation of Petitioners' **right** of access to the courts, and that the indemnity provisions of the MSA, by which the citizenry indemnifies the tobacco companies even for awards of punitive damages, are directly contrary to the public policy of the State which expressly forbids insurance against such liabilities.

The Commonwealth Court's terse Majority Opinion summarized its rationale for adopting a dismissive approach in one sentence (which Dr. Sklaroff extensively parsed and discounted thereafter through subsequent appellate efforts) devoid of references. Dr. Sklaroff could not compel it to cite federal law, despite prior references thereto that appeared in the Petitioners' Brief plus concomitant citations thereof that permeated Judge Kelley's Minority Opinion.

Indeed, the Minority Opinion didn't cite the CoP Constitution (in a broad context); it cited (in other contexts) analyses of other states' constitutions. (Naturally, most of its case-citations were derived from the CoP.) PM asserted **incorrectly** this Court "did not address any federal issues" in its "Counter-Statement of the Case, one of the many errors therein that are corrected in the Petitioner's Reply Brief.

Judge Kelley started his analysis by citing **a federal case**: "However, the contractual nature of a consent decree does not affect the judicial character of a court's acceptance of the decree or its imposition of judgment thereon. Indeed, "[i]t is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is 'a judicial act'." *Pope v. United States*, 323 U.S. 1, 12 (1944)

ARASCO said: "Although the Arizona Supreme Court was free to rest its holding on the State Constitution as an independent ground, the decision below did not divorce the state constitutional issue from the questions of federal law."

Similarly, the Herron Opinion had referred to Article V of the U.S. Bill of Rights when portraying the Petitioners' views, as distinct language from the CoP Constitution:

> They assert, for instance, that their **constitutionally protected right of access to the courts and their right to be free from governmental taking of property without due process or just compensation** would be violated by such a sweeping interpretation of the MSA.

Thus, the *ASARCO* case demonstrates that the Petition should be accepted because it more than satisfies the specific criteria articulated therein, with particular reference to the need to have judicable arguments based upon **federal** law.

b. The *Coleman* Case Supports Dr. Sklaroff.

This is a *habeas corpus* case that includes the following quotation, per PM's Brief: "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." Ignored, however, is the clear distinction ("with a difference") made by the Court: "The basis for application of the independent and adequate state ground doctrine in federal *habeas* is somewhat different than on **direct** review by this Court. . . .The Court does not review a judgment [in a *habeas* case], but the lawfulness of the petitioner's custody simpliciter." [reference omitted]

Thus, the *Coleman* case demonstrates that the Petition should be accepted because citing this doctrine (even in this context) does not defeat the necessity for Court review of the MSA based upon both state and **federal** law. PM's citation merely is of a truism, rather than of a defect in the Petition.

c. The *Herb* Case Supports Dr. Sklaroff.

PM accurately quoted the essence of this case thusly: "[this Court's] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." The Court, however, found the situation ambiguous because "The Supreme Court of Illinois did not decide whether under the State Constitution the Venue Act was unconstitutional, apparently because it held the Act not to apply." Therefore, it held the case in abeyance until the Supreme Court of Illinois had determined whether any federal issues had been weighed in the adjudication thereof.

This choice of disposition would provide an alternative in unclear cases, but subsequent opinions supersede it.

Thus, the *Herb* case demonstrates that the Petition should be accepted because it is deemed **necessary** for the federal judiciary to correct a state court's error in interpreting federal law related to honoring the Petitioner's due process rights.

d. The *Michigan* Case Supports Dr. Sklaroff.

Again, PM accurately quotes the essence of the opinion: "When a state court decision fairly appears to rest primarily on federal law, or [appears] to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." The Court will neither try to interpret state law nor await clarification.

The next sentences remove all remaining ambiguity: "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

"In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." No such phrase appears in any opinion rendered in the MSA's adjudication process in the CoP.

Three **Constitutional Amendments** were cited in this Petition,: I ["Congress shall make no law. . .abridging . . .the right of the people. . .to petition the government for a redress of grievances."]; V ["No person shall. . .be deprived of life, liberty, or property, without due process of law. . . .]; XIV ["No state shall. . .deprive any person of. . .due process."]. The CoP Constitution was also cited in the Petition.

Thus, the *Michigan* case demonstrates that the Petition should be accepted because citation of three Articles in the U.S. Bill of Rights yields an undeniable **federal** component to the litigation history of the instant case, even if it is felt to be interwoven with state-level interpretations of due process.

e. The Briefs and Opinions in this case include federal citations of specific cases and statutes that were invoked in the state court system, but the interpretation of which is now subject to review by the U.S. Supreme Court.

The Herron Opinion cited *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981), quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) and, in footnote #74, cited additional cases thusly: "The Pennsylvania Supreme Court has relied on the *Baker v. Carr* analysis in other cases where it considered whether a particular case presented a nonjusticiable political question." The root forces invoked when interpreting this entire case were framed in a **federal** context at the start of the process.

Discussion of class action litigation in numerous briefs cited two **federal** cases: *In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 65 Fed 3rd 768 & *Georgine et al v. Amchem Products, Inc. et al.*, 83 Fed 3rd 610.

The Appendix to the Petitioners' Brief cited a **federal** case: *Reverend Jessie Brown, et al. v. Philip Morris, Inc., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 98-5518. . .a **federal** race discrimination case brought under the **federal** Civil Rights Act of 1866, 42 U.S.C. 1981 and 1982, and other statutes.

Judge Kelley's analysis included citation of a *parens patriae* reference in a **federal** case [footnote #24: *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated*, 36 F.Supp.2d 560 (E-D. N.Y. 1999)].

The Petitioner's posture is illustrated by this citation from the Writ, drafted prior to knowledge of PM's critique:

> d. Constitutional Concerns.
>
> **Blocking Dr. Sklaroff and the Activists from intervening denies them due process (under the 1st, 5th and 14th Amendments) and equal protection (under the 14th Amendment** and the PA Constitution's Declaration of Rights).
>
> In the latter (Article I), for example, Section 1 deals with the Inherent Rights of Mankind, Section 20 deals with the Right of Petition, and Section 25 deals with Reservation of Powers in People. The class action and civil rights of many future putative litigants have been violated in this matter.

As anticipated, a **federal** court filing by PM on 3/31/99 raised the MSA as an affirmative (11th) defense for present and future actions. *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated*, 36 F.Supp.2d 560 (E-D. N.Y. 1999). PM also invoked the MSA in its Preliminary Objections to the current filing against the Wawa Billboard Advertising.

In addition to his "Wawa" cases against PM and the CoP AG, Dr. Sklaroff articulated two causes-of-action based upon tax-related implications of the MSA justifying a taxpayer suit.

> These causes-of-action are as follows. One would block the Tobacco Industry from making settlement monies tax-deductible. The second would block the Tobacco Industry from invoking Section X ["Effect of Federal Tobacco-Related Legislation"] to invoke "a continuing dollar-for-dollar offset" against the annual payments by the TI to the state were Congress to increase excise taxes, as the MSA depicted in complicated legal language.

Such **federal** litigation could be filed by Dr. Sklaroff.

Judge Kelley analyzed *parens patriae* litigation thusly:

> As the **United States Supreme Court** has noted: The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal Prerogative." These powers and duties were said to be exercised by the King in his capacity as "father of the country." Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics" and as the superintendent of "all charitable uses in the kingdom." In the United States, the "royal prerogative" and the "*parens patriae*" function of the King passed to the States. The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. *Hawaii v. Standard Oil Company*, 405 U.S. 251, 257 (1972)

In all his appeals, "Dr. Sklaroff argued that the lower courts had failed to apply Pennsylvania state law properly." It is **not** true that this was the **sole** basis for these efforts, for this **federal** concern is in prior filings, plus the Writ, and is distilled as a **particular question** that was posed throughout:

> The petitioner—functioning as a citizen, taxpayer, father, activist, physician, private AG and litigant—should not be deprived of standing to intervene prior to final approval of the Master Settlement Agreement between the Tobacco Industry and the Commonwealth of Pennsylvania, under state and **federal** law, based upon his current and future civil and due-process constitutional rights.

Other state-level cases (from around the country) were cited in the Petitioner's Briefs. For example: "The Court was required to weigh the merits of the MSA to ensure it was fair, reasonable and adequate." *In re: Washington Public Power Supply System Sec. Litig.*, 720 F.Supp. 1379, 1387 (D.Ariz. 1989), *aff'd Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992, *cert. Denied*, 506 U.S. 953.

It its "Counter-Statement of the Case," PM admitted that the Writ is "premised **almost** exclusively on interpretations of Pennsylvania state law." It thereby **admitted** it includes interpretations of applicable non-state law, i.e. **federal** law.

PM was disingenuous when it argued this case lacks **federal** underpinnings, recalling this disinterested depiction of how it was responsible for a state-focused case-critique:

> Both the Commonwealth and the Tobacco defendants are careful not to address these substantive arguments in their memoranda. Rather, they suggest that such [federal] arguments are premature. {from Judge Herron's Opinion}

Thus, the pleadings and the opinions rendered in this case have fundamental **federal** underpinnings; furthermore, the state-level interpretations of such issues as due process were predicated on **federal** law.

f. PM's legal citations corroborate the view that Dr. Sklaroff's appeal has properly posed fundamental federal issues for consideration by the Court.

PM notes this Court has usually "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson,* 520 U.S. 83 (1997).

PM admits that in *Adams*, a Writ of Certiorari was dismissed "where petitioner, although raising certain due process arguments before the Alabama Supreme Court, failed to raise the due process challenge contained in the petition." In the instant case, this was certainly not the case.

Key characteristics of what has to have been alleged are contained in *Adams*, criteria that specifically were not met by the Petitioner in that case but which have been met herein. Referencing the "patter" of prior citations, it must be noted that they show incontrovertible evidence of the following: (1) federal due process claims were raised initially and subsequently by citing the Constitution (rather than simply relying upon citation of the words "due process"); (2) discussion of federal cases was not immersed in unrelated argument [citing *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987), *vide infra*]; (3) no court could fairly have read these citations (both individually and in the aggregate) as merely referencing narrow state-level questions; (4) specific reference has been made to the places in the record where the matter appears [Supreme Court Rule 14.1(g)(i)]; (5) the minimum requirement was met that a federal claim was presented [*Webb v. Webb*, 451 U.S. 493, 496-497, 501 (1981) & *Bowe v. Scott*, 233 U.S. 658, 664-665 (1914)] and (6) there can be no doubt that **federal** issues were raised when the statement of the first question posed under the Petition specifically cited **federal** due process.

PM cites *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987) to support its view that "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " In the instant case, as noted earlier, Dr. Sklaroff could not force the CoP Supreme Court to rule; thus, its judgment was directly derived from that of the Commonwealth Court which *supra* weighed **federal** issues.

Thus, **federal** issues permeated the initial complaint, appeals generated therefrom, opinions derived therefrom and the proper presentation of this case at both the state and federal levels. The characteristics thereof meet all legal citations provided by PM, and necessitate rectification by the U.S. Supreme Court.

Ultimately, PM argues that Dr. Sklaroff failed to preserve a federal issue for adjudication by the U.S. Supreme Court, despite the fact that this "thread" that ran through all Briefs resembled, rather, a "rope" that it continues to shun. Indeed, that PM has avoided dealing with these fundamental issues does not minimize their importance, as PM would wish.

PM failed to cite a shred of evidence that linked **this** case with those upon which its Brief had been predicated. Indeed, its four citations support the Petitioner, for this matter has many links to federal law and cases, *vide supra et vide infra.*

This Court should grant a Writ of Certiorari in this matter for the following reasons. First, the state courts' decisions that are the subject of Dr. Sklaroff's petition did **not** turn on adequate and independent state grounds. Second, Dr. Sklaroff's petition raises numerous **federal** issues that have been properly preserved for review by this Court.

And, for these reasons, Dr. Sklaroff's Petition for a Writ of Certiorari must be honored by the U.S. Supreme Court.

Respectfully submitted,

_____

Robert B. Sklaroff, MD